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No. 07-816

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113, WASHINGTON, D.C. 20515
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause requires that when a warrant for the search of a Congressman's office is executed, the Member must be afforded an opportunity to segregate privileged legislative materials and shield them from review by the executive branch?

2. Whether the judgment of the court of appeals, which grants the executive access to non-privileged records seized from Rep. Jefferson's office, should be reviewed at the request of the executive when the executive has always insisted that the search warrant at issue sought only non-privileged records?

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## STATEMENT OF THE CASE

Congressman William J. Jefferson submits that certiorari is not warranted in this case. Contrary to the misleading question presented, the decision below does not prohibit the execution of search warrants on Congressional offices or render Members of Congress immune from public corruption investigations. Instead, the narrow issue addressed by the court of appeals was whether the particular procedures devised by the Department of Justice ("DOJ") for the search of Rep. Jefferson's offices comported with the Speech or Debate Clause. The court concluded that they did not, because those procedures involved the compelled disclosure of legislative material to executive branch agents, with no opportunity for the Member to shield privileged material from review. This conclusion correctly applies this Court's teachings regarding the scope and absolute nature of the Speech or Debate privilege, and it permits the executive branch to execute search warrants on Congressional offices in the future as long as appropriate procedures are followed.

Further, certiorari is not warranted because DOJ's petition does not challenge the judgment of the court below that governs this case. Instead, it seeks an advisory opinion on the application of the Speech or Debate Clause to matters that are not before this Court. DOJ's petition must be considered in the context of the unique procedural posture of this case. In an unusual preliminary order, the court of appeals remanded the case to permit the

Congressman to review all of the seized documents for privilege, subject to judicial review (the "Remand Order"). At DOJ's request, the court of appeals later modified the order and authorized the release to DOJ of all documents as to which the Congressman did not claim privilege. Thus, the court of appeals accorded the Congressman the opportunity he sought to shield legislative material from review, but it also gave the executive access to what it claimed it had been seeking all along: the non-privileged records. In its brief, DOJ accepted the Remand Order and specifically argued that the search should be upheld in light of the court's remand procedures. The court incorporated the remand procedures in the judgment – as DOJ had essentially invited it to do.

Under the judgment, then, DOJ is entitled to obtain all documents determined to be outside the scope of the legislative privilege. DOJ has always asserted that its warrant sought only non-privileged documents. Thus, the judgment provides DOJ with all of the documents it claims it sought via the search that was the subject of this litigation. DOJ's petition is not aimed at obtaining additional documents or otherwise reversing the result in this case. So, its challenge is not to the actual judgment below, but only to statements contained in the opinion. What DOJ really wants is an advisory opinion on the application of the Speech or Debate Clause to other persons and other investigative techniques that were not part of this litigation. This is not an appropriate basis for a grant of certiorari.

1. On May 20 and 21, 2006, the executive branch executed a search warrant on Rayburn House Office Building Room 2113, the offices of Congressman William J. Jefferson, the elected

representative of the people of the 2nd District of Louisiana.

2. The search was conducted pursuant to a warrant issued by Chief Judge Thomas Hogan of the United States District Court for the District of Columbia. The warrant authorized the seizure of records and documents, electronic or otherwise, related to a list of 30 entities and individuals. JA 7,[1] Sealed Appendix at 18-19. The warrant permitted the agents to copy or remove the entire hard drive of each computer found in the offices. Thus, pursuant to the warrant, every paper document in the offices, and every electronic record stored on the Congressman's computer or on his staff members' computers, was subject to examination and seizure by the executive branch.

3. The affidavit set out "special procedures in order to identify information that may fall within the purview of the Speech or Debate Clause privilege." JA 79; *see* JA 79-87. These procedures, which applied to both paper records and electronic media, provided that the physical search would be conducted by "non-case agents" who had no other role in the investigation. These executive branch agents were to review all of the paper records in the Congressman's office and seize any responsive records they found. The agents were also to copy the computer hard drives from the offices, which were later to be searched electronically by the FBI to discover all records that contained any one of the

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[1] "JA" references are to the public joint appendix filed in the court of appeals. "Pet.App." references are to the appendix to the Petition.

approximately 100 computer search terms listed in the warrant.

As described in the FBI's affidavit, the paper and electronic records identified through these procedures would then be provided to a "Filter Team" consisting of DOJ lawyers and a Special Agent not otherwise involved in the investigation. The DOJ Filter Team was to review all of the records identified by the agents as responsive to determine whether the Speech or Debate privilege applied to them. Documents that the DOJ Filter Team – in its sole judgment – concluded were not privileged were to be immediately provided to the prosecution team without further review by anyone. Documents that the DOJ Filter Team determined were "potentially privileged" were to be identified in a log to be provided to the Congressman, who could then consent or object to their production, with the court to rule on his objections. JA 79-87.

The warrant procedures did not permit the Congressman to review his files and segregate legislative materials before they were examined or seized by DOJ, nor did the procedures provide the Congressman with any opportunity to assert the privilege with respect to those documents the DOJ Filter Team decided were not privileged.

4. The FBI executed the search warrant on the night of Saturday, May 20, 2006. Approximately 15 FBI agents descended on Rep. Jefferson's offices in the Rayburn House Office Building. Over the course of the next 18 hours, the agents inspected every document in the office suite and copied every computer hard drive or other electronic storage device they could find. JA 186. At the conclusion of the search, the FBI carted away

two boxes of paper files and copies of over a dozen computer hard drives or other electronic media. [2]

5. On May 24, 2006, Rep. Jefferson filed his motion for the return of all material seized pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure. The Congressman argued that the search was unconstitutional in its design and execution since it did not afford the Member any opportunity to segregate legislative material from examination and seizure by the executive branch.[3]

6. As part of his motion, Rep. Jefferson also sought an immediate order enjoining DOJ from any further review of the materials pending the resolution of his motion. JA 99-100. Before the district court could act, the President of the United States ordered that the seized material be sequestered for a forty-five day cooling off period.

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[2] The computer files were copied during the search of the Congressman's office, but were not examined by the FBI agents at that time. DOJ intended to conduct a later search of all of the seized electronic media using the terms in the warrant, and then to apply its filter team procedures to the records identified as responsive. This did not occur because of the President's freeze order and the remand procedures subsequently imposed by the court of appeals.

[3] In its written response to Rep. Jefferson's motion, DOJ offered to follow a different set of procedures for handling the seized documents. JA 132-33. The proposed revised procedures – which were not set forth in the warrant application – would have provided Rep. Jefferson with a copy of what had been removed from the office, and would have permitted him to interpose an objection to privilege decisions once they had been made by DOJ. But even under the proposed new procedures, the executive would have retained its ability to conduct an unlimited review of all records seized from Rep. Jefferson's office and computers, and the privilege determination was again assigned initially to the executive branch.

The district court then ordered that this seal be maintained while it considered the matter. JA 121.

7. A hearing on the Congressman's motion was held on June 16, 2006. On July 10, 2006, the district court denied the motion for return of property and authorized DOJ to resume its review of the Congressman's records. Rep. Jefferson filed a timely notice of appeal and urged the district court to stay the execution of its order granting the executive the right to begin an immediate review of the records.

8. After the district court denied his motion for a stay pending appeal, Rep. Jefferson filed a motion for stay in the court of appeals. In connection with its consideration of that motion, the D.C. Circuit issued an order on July 28, 2006, directing that the record be remanded to the district court for the limited purpose of making findings concerning which seized records were covered by the Speech or Debate privilege. JA 421-22, Pet.App. 75a-76a. The Remand Order specified that copies of all paper documents seized, and all computer records identified through an electronic search using the terms in the warrant, were to be provided to Rep. Jefferson, but not to DOJ. The order directed the Congressman to submit to the district court, *ex parte*, his claims that specific documents or records were legislative in nature. *Id.* Pending further order from the court, DOJ was enjoined from undertaking any further review of the seized records. JA 421, Pet.App. 76a.

9. DOJ subsequently moved for a modification of the stay, seeking immediate access to those materials which the Congressman had determined were not covered by the privilege. On

November 14, 2006, the D.C. Circuit granted the motion, permitting DOJ to obtain all non-privileged documents for use in its investigation. *See United States v. Rayburn House Office Building*, 497 F.3d 654, 658 (D.C. Cir. 2007), Pet.App. 8a. Of the approximately 47,000 pages of records provided to the Congressman pursuant to the remand order, the Congressman claimed privilege as to approximately 50% of the paper records and 41% of the electronic records. *See* JA 432-98. [4] All records as to which the Congressman did not claim privilege have been provided to DOJ.

10. The appeal of the district court's denial of the motion for return of property addressed the constitutionality of the procedure set forth in the warrant: the unfettered review of all of a Member's records by the executive. But as a result of the procedures implemented by the court of appeals, the Congressman had the opportunity to review the responsive electronic records first, and to separate the legislative ones before the records were produced to DOJ. Thus, in the end, the executive had complete access only to the paper records reviewed during the

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[4] The 15 computer hard drives were searched electronically for all records that contained any one of the approximately 100 search terms in the warrant, whether or not they related to the subject matter of the investigation. Given the number and breadth of the search terms, which included common surnames (*e.g.*, "Jackson" and "Simmons"), it became apparent that the computer search would yield an unmanageable volume of records. Sealed Appendix at 258-63. The search procedures were therefore curtailed, *id.*, but even then the computer search produced over 45,000 pages of electronic records, most of which are unrelated to the matters under investigation.

execution of the search itself. DOJ's brief to the court of appeals acknowledged that in light of the Remand Order and the modification of the stay, the issue presented was a narrow one:

> *[A]s implemented under orders of this Court,* [the search warrant] will result in no Executive Branch official having any further access to the seized materials unless and until Rep. Jefferson determines, or an Article III tribunal has ruled, that the material enjoys no claim of privilege. *Under those circumstances,* the narrow issue presented is whether the incidental review of arguably protected legislative materials during the execution of the search warrant so taints the activity that a constitutional violation must be found and then remedied by the return of *all* documents to Rep. Jefferson . . . .

Brief for the United States, at 15 (emphasis added).

DOJ's statement of the issues also made clear its acceptance of the procedures under the Remand Order. DOJ's brief asserted that the question before the court was whether the search was constitutional where, *inter alia,* "Rep. Jefferson was able to raise document-by-document claims of privilege with the district court, *ex parte,* before the prosecution team (or even a filter team) could review any of the seized materials." Brief for the United States at 3.

DOJ further indicated its understanding that the remand procedures would remain in place:

> In any event, the procedures imposed by this Court are in place, and they will ensure against any further Executive Branch contact with the seized materials unless Rep. Jefferson or a court finds that the documents are unprivileged.

Brief for the United States, at 35.

11. On June 4, 2007, a grand jury in the Eastern District of Virginia returned a 16-count indictment against Rep. Jefferson. Both parties agreed that the return of the indictment did not divest the court of appeals of jurisdiction over the appeal. 497 F.3d at 658, Pet.App. 8a-9a.

12. The court of appeals issued its ruling on August 3, 2007. *United States v. Rayburn House Office Building,* 497 F.3d 654, Pet.App. 1a-39a. In answering the question presented on appeal, the court held that the particular search procedures embodied in the warrant violated the absolute privilege contained in the Clause as it has been interpreted by this Court. The court also relied on the holding in *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), that the testimonial privilege created by the Speech or Debate Clause includes a non-disclosure privilege applicable to legislative documents. 497 F.3d at 660, Pet.App. 11a. The court stated that "the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put," that "[t]he bar on compelled disclosure is absolute," and that "there is no reason to believe that the bar does not apply in the criminal as well as the civil context." 497 F.3d at 660,

Pet.App. 12a-13a. The court found that "[t]he search of Congressman Jefferson's office *must have* resulted in the disclosure of legislative materials to agents of the Executive." 497 F.3d at 661, Pet.App. 13a (emphasis added). Indeed, "[t]he compelled disclosure of legislative materials to FBI agents executing the search warrant was *not unintentional but deliberate* – a means to uncover responsive non-privileged materials." 497 F.3d at 662, Pet.App. 17a (emphasis added).

The court of appeals concluded that "a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause." 497 F.3d at 663, Pet.App. 18a. The court found that the search of the paper files carried out at the Congressman's office violated the Clause, but that the copying of computer hard drives had been rendered permissible because "the Remand Order affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive." 497 F.3d at 663, Pet.App. 18a.

13. The court did not attempt to define the procedures to be employed whenever a Congressional office was to be searched. It noted that the practical concerns raised by DOJ about conducting searches after a Member had first been permitted to assert his Speech or Debate privilege could be addressed by appropriate procedures, but left the specifics of such procedures for determination by the legislative and executive branches in the first instance. 497 F.3d at 662-63, Pet.App. 17a-18a.

14. With regard to remedy, the court held that Rep. Jefferson was entitled, as determined in

the first instance by the district court pursuant to the Remand Order, to the return of all privileged documents seized from his Congressional office, but that, "absent any claim of disruption of the congressional office by reason of lack of original versions," there was no basis under Rule 41(g) for ordering the return of non-privileged documents. 497 F.3d at 665, Pet.App. 22a-23a. Because Rep. Jefferson had been indicted, the court noted that its jurisdiction to consider any further reasons for return of the non-privileged documents was doubtful. 497 F.3d at 665, Pet.App. at 23a.

15. Judge Henderson concurred in the court of appeals' judgment: "while I concur in the judgment which affirms the district court's denial of Representative ... Jefferson's ... Rule 41(g) motion, I do not agree with the majority's reasoning and distance myself from much of its dicta." 497 F.3d at 667, Pet.App. 26a.

16. DOJ's petition for rehearing *en banc* was denied by the court of appeals on November 9, 2007. Pet.App. 73a-74a. The mandate issued on December 28, 2007.

17. The remand proceeding is still pending in the United States District Court for the District of Columbia. The criminal trial in the Eastern District of Virginia is currently scheduled to begin on February 25, 2008.[5] DOJ has stated that it "does not

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[5] The defense has filed a motion in the criminal case to suppress all of the material seized from Rep. Jefferson's office, including non-privileged records, on the grounds of the illegality of the underlying search. That motion is currently pending. Because of the possibility of interlocutory appeals on various other issues by either Rep. Jefferson or DOJ, the February 25, 2008 trial date may be postponed.

intend to seek a delay in the hope of securing additional evidence after the district court has completed its review of the Congressman's privilege claims." Petition, at 10-11.

## REASONS FOR DENYING THE PETITION

### I. The Petition Is Aimed At The Opinion Of The Court Of Appeals, Not Its Judgment, And Seeks An Advisory Opinion On Matters Not Before The Court.

As this Court has made clear, it "reviews judgments, not statements in opinions," *California v. Rooney*, 483 U.S. 307, 311 (1987) (citations omitted), and "do[es] not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982). In this case, DOJ's petition does not challenge the judgment below, but instead seeks an advisory opinion about matters well outside of the scope of this litigation. Under the circumstances, the petition for a writ of certiorari should be denied.

As outlined above, the court of appeals entered a preliminary remand order that permitted Rep. Jefferson to review the seized documents, identify those that were privileged, and submit his claims of privilege *ex parte* to the district court, to be reviewed *in camera*. JA 421, Pet.App. 75a-76a. The Remand Order enjoined the executive branch from any further examination of the seized documents pending further order of the court. *Id.* The procedures imposed by the Remand Order thus essentially mirrored those that the Congressman

contended were necessary for a constitutionally valid search. In order to ensure that the grand jury investigation could proceed, the court subsequently modified its stay order at DOJ's request, allowing DOJ to obtain all of the documents as to which the Congressman did not claim privilege. 497 F.3d at 658, Pet.App. 8a.

DOJ did not challenge the Remand Order. To the contrary, DOJ's brief to the D.C. Circuit was premised on the existence of the Remand Order. DOJ indicated that it accepted the Remand Order as governing the search warrant. *See* Brief for the United States, at 15. DOJ acknowledged that the Remand Order would remain in place to govern the procedures by which privileged and non-privileged documents would be identified. *See* Brief for the United States, at 35. DOJ also relied on the remand procedures to defend the constitutionality of the search. *See* Brief for the United States, at 3, 15.

The court of appeals incorporated the results of the remand procedure in fashioning the remedy in this case: it found that Rep. Jefferson was entitled to the return of all documents determined by the district court to be privileged, but not to the return of any non-privileged documents. 497 F.3d at 665, Pet.App. 22a-24a.[6] It has always been DOJ's position that its search warrant sought only non-privileged documents. *See, e.g.,* Petition, at 4 (the warrant "did not seek any 'legitimate legislative

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[6] DOJ has now stated that it does not need any documents that it might be able to obtain after the district court's privilege review is complete in order to proceed with Rep. Jefferson's criminal trial. Petition, at 11.

material that would be considered privileged ...'").[7] As a result of the remand procedures, therefore, DOJ has received or will receive all of the non-privileged documents seized from Rep. Jefferson's office. The court of appeals' judgment thus provides the executive with all of the documents it claims it asked for. DOJ will obtain no more evidence if the court of appeals' decision is reversed than it will if the decision stands.

Thus, DOJ has no real quarrel with the judgment entered below. Instead, its challenge is to the court's opinion that the procedures set forth in the warrant did not comport with the Speech or Debate Clause. But this request runs afoul of this Court's clear pronouncement that it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. at 311 (citations omitted). DOJ should not be granted review of a judgment which it

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[7] While it may be true that DOJ's ultimate objective in the search was to obtain for the prosecution team only non-privileged records, it is not correct to say that the search warrant sought only non-privileged records. The very design of the warrant – using "non-case agents" during the search and a DOJ Filter Team thereafter – reflects DOJ's intention that privileged material was to be reviewed by the executive and seized pursuant to the warrant. As the court of appeals found, "[t]he compelled disclosure of legislative materials to FBI agents executing the search warrant was not unintentional but deliberate – a means to uncover responsive non-privileged materials." 497 F.3d at 662; Pet.App. 17a. The fact that the warrant called for executive branch agents to examine all of the Congressman's records lies at the heart of both Rep. Jefferson's constitutional challenge to the search and the ruling of the court of appeals.

invited and which provides it with what it sought in this case.[8]

DOJ admits in its petition that it does not seek any additional documents for the criminal trial against Rep. Jefferson. Petition, at 10-11. It asserts

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[8] In a footnote, the petition attempts to brush aside the impact of DOJ's acknowledgment in its brief below that the Remand Order would stay in place. *See* Petition, at 23 n.4. DOJ asserts that it made that submission in the expectation that the remand process would be quickly completed. DOJ's brief, however, contained no such qualification. DOJ further notes that it also argued, and the court of appeals reached, the question of the constitutionality of the search procedures in the warrant, and that the court's decision invalidated the filter-team procedures contemplated by the warrant. But this does not negate the fact that DOJ's position below was premised on the existence of the Remand Order, which provided that review of Rep. Jefferson's privilege claims would be conducted by the district court *in camera*. Given its acceptance of that order, DOJ cannot now argue that it is aggrieved because the judgment, which incorporates the remand procedures, does not allow its filter teams to participate in this process.

Even if the executive were entitled to challenge the judgment on the grounds that it denies DOJ the procedural right to have its filter team participate in the privilege review process, this procedural point is not sufficient reason for granting review here. First, the court of appeals' conclusion that judicial review of privilege claims must be conducted *ex parte* is required by the absolute nature of the Speech or Debate privilege. Further, the district court is plainly capable of resolving privilege questions on an *ex parte* basis, and its conclusions are subject to review. In addition, DOJ has already submitted a lengthy memorandum to the district court thoroughly explaining its views regarding the scope of the legislative privilege as applied to Rep. Jefferson's documents in this case. DOJ cannot credibly suggest that the privilege review will not be conducted properly under the procedures imposed by the court of appeals.

that the evidence seized from the Congressional office "remains relevant to the government's ongoing investigation *of others* who may have been involved in criminal activity with Representative Jefferson."[9] Petition at 11 (emphasis added). Thus DOJ has admitted that its concerns in this case are not with Rep. Jefferson or any issues arising out of the motion for return of property that was the basis of this litigation. Instead, the petition's plain focus is on other persons and other matters not before this Court.

The petition describes in detail the perceived impediments to other potential searches of Congressional offices that DOJ may choose to execute in the future under terms that have yet to be devised. The petition is also replete with references to other law enforcement techniques that were either not used or not challenged in this case. The petition attempts to raise an alarm about the viability of "searches of Congressmen's district offices in their home states for documents," about searches of a Member's "homes, vehicles, and briefcases," including searches in "an office of a Member located in his home," about "wiretaps and pen registers directed at Members," and about "conducting voluntary interviews with Hill staffers without the Members' consent." Petition, at 24-25.

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[9] But, for the reasons discussed above, the judgment below provides DOJ with all of the evidence it sought under the warrant in any event, regardless of whether that evidence is relevant to investigations of other participants in Rep. Jefferson's alleged criminal activity.

DOJ's claims that the court of appeals' decision will jeopardize other investigations or the use of other investigative techniques are substantially exaggerated. But even if the Speech or Debate Clause could be implicated in a future investigation, it is obvious that the focus of the instant petition is on persons who are not parties to this case and investigative techniques not at issue here. Like the execution of the search warrant in this case, the legality of such techniques will turn on the specific manner in which they are implemented. These matters were not briefed or argued in the lower courts, and cannot be addressed now. The petition essentially seeks an advisory opinion on the application of the Speech or Debate Clause to matters that are not before this Court at all, let alone ripe for decision. Since this Court does not decide hypothetical issues or give advisory opinions, *Princeton University v. Schmid*, 455 U.S. at 102, the petition should be denied.

## II. The Court Of Appeals Correctly Concluded That The Speech Or Debate Clause Prohibits Compelled Disclosure Of Legislative Material To The Executive Branch During The Execution Of A Search.

In its effort to obtain review, the petition mischaracterizes the court of appeals' decision and overstates its impact. Although DOJ claims that the issue in this case is whether the Speech or Debate Clause "bars Executive Branch agents from executing a judicially issued warrant in a Member's office to search for non-legislative records of criminal activity" (Petition, at (I)), neither Rep. Jefferson nor

any of the *amici* ever asserted that all searches of Congressional offices were barred, nor did the court of appeals so hold. Instead, the question on appeal was "whether the procedures under which the search [of Rep. Jefferson's office] was conducted were sufficiently protective of the legislative privilege created by the Speech or Debate Clause." *United States v. Rayburn House Office Building, Room 2113*, 497 F.3d at 655, Pet.App. 1a-2a. The answer reached by the court of appeals was no, because the procedures employed by the executive in this particular search entailed the compelled disclosure of legislative material to executive branch agents, and afforded no opportunity to the Member to shield privileged legislative material from review.

Because the sole question presented by the petition is not raised by the decision below, a grant of certiorari is not warranted. Moreover, certiorari is not necessary in any event because the conclusion actually reached by the court of appeals correctly applies the teachings of this Court regarding the scope and absolute nature of the Speech or Debate privilege.

### A. The Non-Disclosure Privilege Is Squarely Grounded In This Court's Speech Or Debate Rulings.

The purpose of the Speech or Debate Clause is "to preserve the independence and thereby the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524 (1972). It also serves the additional function of reinforcing the separation of powers among the three co-equal branches of government. *Eastland v. United States Servicemen's*

*Fund*, 421 U.S. 491, 502 (1975). The Clause is not interpreted with a "literalistic approach," *Gravel v. United States*, 408 U.S. 606, 617 (1972), but is read "broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. Where the Clause applies, it is "absolute," and "balancing plays no part." *Id.* at 509-10.

The founding fathers specifically envisioned the need to provide "practical security" that would shield the legislature against "invasion" by one of the other branches. The Federalist No. 48 (James Madison). "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." *United States v. Johnson*, 383 U.S. 169, 179 (1966). This Court has interpreted the Clause to protect Members from civil or criminal liability for, or the evidentiary use of, their legislative activities. *See, e.g., Gravel*, 408 U.S. at 615-16; *United States v. Helstoski*, 442 U.S. 477, 487 (1979). The Clause also prevents a Congressman from being questioned about legislative acts and "the motivation for those acts." *Helstoski*, 442 U.S. at 489, quoting *Brewster*, 408 U.S. at 525; *see also Gravel*, 408 U.S. at 615-16. This has been referred to as the "testimonial" prong of the privilege. *See Brown & Williamson*, 62 F.3d at 417.

In *Brown & Williamson*, the D.C. Circuit recognized that the testimonial privilege must apply equally to oral questioning and to efforts to obtain documents:

> We do not accept the proposition that the testimonial immunity of the Speech

> or Debate Clause only applies when Members or their aides are personally questioned. Documentary evidence can certainly be as revealing as oral communications – even if only indirectly when, as here, the documents in question...do not detail specific congressional actions. But indications as to what Congress is looking at provide clues as to what Congress is doing, or might be about to do ....

*Brown & Williamson*, 62 F.3d at 420. *Brown & Williamson* held that a legislator's right to be free from "questioning" justified congressional refusals to disclose legislative documents – in other words, that the Speech or Debate Clause included a "non-disclosure privilege" with respect to documents. *See United States v. Rayburn House Office Building*, 497 F.3d at 660, Pet.App. 11a.

The court of appeals' decision here applied *Brown & Williamson's* non-disclosure privilege to the circumstances of this case, which involved a team of FBI agents combing through every piece of paper in a Congressman's office. In a finding that has not been challenged by DOJ, the court stated that "The search of Congressman Jefferson's office *must have* resulted in the disclosure of legislative materials to agents of the Executive. Indeed, the application accompanying the warrant contemplated it." 497 F.3d at 661, Pet.App. 13a (emphasis added). The court recognized the patent fact that review of a Member's Congressional documents by executive branch agents pursuant to a search warrant is "compelled," not voluntary, disclosure, and further

that such an invasion falls squarely within the evils the Clause is designed to prevent.

> This compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress and the Member's staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process.

497 F.3d at 661, Pet.App. 13a-14a. Thus, in order to protect the independent functioning of the legislature and preserve the separation of powers, and in light of the "absolute" nature of the privilege, the Clause *must* protect a Member from the forced disclosure of legislative documents that was contemplated by the warrant here.

The petition asserts that the Speech or Debate Clause does not encompass the non-disclosure privilege recognized in *Brown & Williamson* and applied by the court of appeals. DOJ argues that the Clause is aimed at legislative activities that are generally public in nature and is not a confidentiality privilege. This argument ignores the full scope of the protections afforded by the Speech or Debate Clause.

There is no doubt that the Speech or Debate privilege attaches to public legislative activities – but it is not limited to them. The protection afforded to Members of Congress by the Clause applies to all activities "within the legislative sphere." *Doe v. McMillan*, 412 U.S. 306, 312–313 (1973). Activities fall within that sphere if they are

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

*Eastland*, 421 U.S. at 501, quoting *Gravel*, 408 U.S. at 625.

Applying that principle, many of the matters that plainly fall within the legislative sphere are *not* public. As this Court has held, the Clause protects legislators from being questioned not only about their legislative acts, but also about "the motivation for those acts." *Helstoski*, 442 U.S. at 489, quoting *Brewster*, 408 U.S. at 525. Legislators' motivations are not necessarily public matters. Similarly, communications with other legislators, communications from constituents, and information gathering in connection with proposed legislation are often not carried out in public, yet are protected legislative activities. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983);

*McSurely v. McClellan*, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976).

The protection afforded to legislators against being questioned about these matters means that legislators cannot be compelled to disclose the reasons for their legislative acts or communications or information related to legislation. As Judge Silberman pointed out in *Brown & Williamson*, documents can be just as revealing of these matters as oral communications, so the compelled disclosure of documents is the equivalent of compelled oral testimony. Thus, the non-disclosure privilege for legislative documents recognized by the court of appeals is grounded in and required by this Court's Speech or Debate jurisprudence. It is necessary to permit the legislators to deliberate free of interference and disruption.

A finding that the Speech or Debate Clause does not include a non-disclosure privilege would permit exactly what the Clause was designed to prevent: a politically motivated investigation involving the execution of search warrants expressly aimed at legislative documents. While the Speech or Debate Clause would offer protection against the use of legislative documents as evidence – if criminal charges were actually brought against the Member – there would be no protection against the political use of the documents by the executive, nor any safe harbor that would abate the chilling impact on legislative activity. Moreover, if there is no non-disclosure privilege, Members of Congress would have virtually no grounds to resist grand jury subpoenas demanding the production of legislative materials, and they would be defenseless against subpoenas from private parties in civil cases.

### B. The Speech Or Debate Clause Applies To Search Warrants.

DOJ attempts to distinguish *Brown & Williamson*, and to differentiate search warrants from subpoenas – thereby excluding search warrants from the ambit of the Speech or Debate Clause – by importing concepts from Fifth Amendment jurisprudence that have no applicability to the legislative privilege. It argues that just as the execution of a search warrant is not considered to involve "testimony" for Fifth Amendment purposes, it also cannot be considered to involve "testimony" for Speech or Debate purposes. But DOJ's attempt to inject Fifth Amendment concepts into the Speech or Debate arena is misguided and unsupported.

The purpose of the Fifth Amendment is to safeguard an individual's freedom and dignity against coercion by the state, *see Miranda v. Arizona*, 384 U.S. 436, 460 (1966), and this Court has established that the contents of documents in a person's possession are not shielded by the Fifth Amendment. *See United States v. Doe*, 465 U.S. 605, 611-12 (1984). But through the act of producing documents in response to a subpoena, an individual makes implicit representations about the existence, authenticity, or subject matter of his records. Accordingly, this Court has held that a request for records, even if it does not call for oral testimony, can have testimonial aspects that implicate the Fifth Amendment privilege. *United States v. Hubbell*, 530 U.S. 27 (2000). Because the execution of a search warrant and the seizure of documents does not call upon the subject of the warrant to say or do anything, the Court has determined that searches in

and of themselves do not trigger Fifth Amendment protections. *See Andresen v. Maryland*, 427 U.S. 463 (1976).

The purpose of the Speech or Debate Clause, by contrast, is to protect the institutional independence and integrity of the legislature and to prevent intrusions into the legislative process. The privilege embraces not only legislative acts but the motivation and intentions behind those acts, *see Brewster,* 408 U.S. at 525, which are reflected, at least in part, in the contents of the records contained within a legislator's files. This is especially true in modern day legislative practice, laden with reports, emails and other documents. The contents of legislative documents lie directly at the heart of the Speech or Debate privilege because the Speech or Debate privilege protects the functioning of the legislature and the legislative process. Compelled disclosure of the contents of legislative documents is at least as intrusive, and has at least as much potential to chill legislative activities and impair the workings of the legislature as oral questioning, because documents reveal as much about what legislators are thinking and doing as responses to questions would. *See Brown & Williamson*, 62 F.3d at 420.

The fallacy of DOJ's position is further exposed by extending its analysis. As noted, even though the Fifth Amendment does not protect the contents of documents, it has been held to protect the "testimony" inherent in the act of producing documents in response to a subpoena. Would DOJ argue that in the subpoena context, a Member may not withhold documents on the grounds that their contents are privileged legislative material, but he

can assert the Speech or Debate Clause if he can identify some communication inherent in the act of production that falls within the privilege?[10] This result is at odds with longstanding practice in responding to subpoenas to Members, including DOJ's own practices.[11]

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[10] It is simply not plausible that this newly-concocted and fundamentally questionable theory represents the full extent of the constitutional protection available to Members under the Speech or Debate Clause in response to demands from the executive for legislative documents. It is difficult, if not impossible, even to hypothesize what legislative information could be conveyed through the mere act of producing records. The purpose of the Clause is to protect substantive legislative acts and thought processes from review, not the narrow range of implicit statements covered by an act of production privilege, *e.g.*, "here are the responsive records that were in my office."

[11] *See* U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 2046:

> In addition, both the House and the Senate consider that the Speech and [sic] Debate Clause gives them an institutional right to refuse requests for information that originate in the Executive or the Judicial Branches that concern the legislative process. ... This applies to grand jury subpoenas, and to requests that seek testimony *as well as documents*. The customary practice when seeking information from the Legislative Branch which is not voluntarily forthcoming from a Senator or Member is to route the request through the Clerk of the House or the Secretary of the Senate....

Available at http//www.usdoj.gov/usao/eousa/foia. reading room/usam/tit9/crm02046.htm. (emphasis added).

Because the critical factor in a Speech or Debate analysis is interference with the legislative process, motivations, and deliberations, Fifth Amendment concepts have no application here. It is appropriate and necessary to treat the compelled disclosure of the contents of documents, whether pursuant to a search warrant or a subpoena, as falling within the "testimonial" prong of the privilege for Speech or Debate purposes.

### C. Allowing Executive Agents To Review Legislative Materials During A Search Impairs Legislative Functions.

DOJ further argues that executing a warrant under the original procedures set forth in the warrant is not a sufficient impairment of legislative activities to violate the Clause. But DOJ has long recognized that even the issuance of a subpoena could implicate the privilege. The suggestion that an unannounced raid by a team of agents could somehow be less invasive or less disruptive than a calm exchange of paper through counsel does not comport with reality.

DOJ attempts to ground its argument on this Court's statement in *Gravel* that the Clause extends "beyond pure speech or debate in either House ... 'only when necessary to prevent indirect impairment of such deliberations.'" 408 U.S. at 625 (citation omitted). But the quoted statement was made in the context of defining what constitutes a legislative act, *id.*, not for purposes of determining whether, once it is clear that a matter within the legislative sphere is involved, some intrusions into the privilege protecting that matter may be permissible. This

standard does not govern the question of whether the executive's review of legislative records violated the Clause.

Moreover, DOJ's attempt to minimize the violation of the privilege by denoting it as "incidental" to the search denies the fact that review of Rep. Jefferson's records by executive agents was an essential aspect of the search authorized by the warrant. 497 F.3d at 662, Pet.App. 17a. And as the court of appeals noted, DOJ did not deny "that some impairment of legislative deliberations occurred" as the result of the compelled review of materials in the Congressman's office. 497 F.3d at 661, Pet.App. 14a-15a. DOJ's argument that any chill on legislative activities that may result from the executive's review of legislative materials under the search procedures it adopted for Rep. Jefferson's office is too remote to violate the Clause is undermined by this concession. More fundamentally, the argument fails to take account of this Court's clear directives that the Speech or Debate privilege is "absolute" and "balancing plays no part." *See Eastland*, 421 U.S. at 509-10. Finally, DOJ's reliance on *United States v. Nixon*, 418 U.S. 683 (1974), is misplaced because that case did not involve an absolute privilege spelled out in the Constitution.

### D. The Court Of Appeals' Decision Does Not Prevent Searches Of Congressional Offices Or Otherwise Unduly Impede Law Enforcement.

DOJ's claim that the court of appeals' decision will make Congressional offices "a sanctuary for crime" and undermine the separation of powers is

pure hyperbole, exposed by the simple fact that never before in the history of this country has the executive branch deemed a search of a Congressional office to be necessary to achieve the goals of law enforcement. The decision does not bar executive branch agents from conducting a second search of a Congressional office in the future, or require that the Member have sole control of his office during its execution. Instead, the opinion recognizes that the interests of law enforcement can be protected by appropriate procedures – such as "initially sealing the office to be searched before the Member is afforded an opportunity to identify potentially privileged legislative materials" – but appropriately leaves the specifics of such procedures for determination by the legislative and executive branches in the first instance. 497 F.3d at 663, Pet.App. 17a-18a.

DOJ offers a "parade of horribles" that it contends will occur if a Member is allowed to conduct a privilege review of documents in his office prior to a search. But there is no reason why all of these purported concerns could not be resolved by having the privilege review take place under the supervision of executive branch agents, who could control the scene and monitor the process without reviewing the contents of documents.[12]

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[12] DOJ cites the unproven allegation that Rep. Jefferson attempted to conceal a document during a search of his home in New Orleans as "evidence" that such tampering could occur if a search scene were controlled by the Member. Petition, at 20-21. But this disputed claim is based on the observations of an FBI agent who was present at that search – demonstrating that standard search procedures are sufficient to preserve documents at a search scene. Even by DOJ's own description of the scenario, the agent asked for, and immediately received,

DOJ further argues that any procedures that allow the Member to assert his privilege before a search, subject to judicial review, will lead to lengthy delays due to the volume of legislative materials in a Congressional office.[13] But the type of privilege review that may be required under the court of appeals' decision is not unique. First, even under the revised procedures offered by DOJ in the district court, the Congressman would have had the opportunity to raise privilege claims that, if challenged, would have been submitted to the district court. Further, if the executive seeks documents by subpoena, any proceedings to challenge privilege assertions would require judicial review of a volume of documents that could be similar to the volume here. Since the same task would face the reviewing court in either case, any difficulties associated with judicial review cannot be grounds for the claim that the procedures contemplated by the decision are so impracticable that they are not constitutionally required.

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the document. Finally, this argument, grounded in the presumption that Members of Congress are prone to obstruction of justice, is also refuted by the fact that even after the alleged incident at Rep. Jefferson's residence, DOJ did not immediately seek a search warrant for his Congressional office. Instead, DOJ chose to proceed by subpoena. Although DOJ subsequently complained about the results of the subpoena process, those results were the product of issues appropriately raised and decided in separate litigation. *See* Sealed Appendix at 36-99.

[13] As DOJ knows, the timing of the document review process in this case was affected by the pendency of the appeal.

DOJ's argument that its use of other law enforcement techniques in public corruption investigations will be stymied by the court of appeals' decision is also exaggerated. The decision applies only to locations where "legislative materials were inevitably to be found." 497 F.3d at 661, Pet.App. 15a. While it is appropriate that searches of district offices would be subject to the same restrictions as searches of Capitol Hill offices, those rules would not necessarily apply to Members' cars or homes.[14] Further, the non-disclosure privilege would not impede DOJ's ability to conduct voluntary interviews with Hill staffers. The decision below only applies to compelled, not voluntary, disclosures.[15] Moreover, congressional staffers are a legislator's alter ego for Speech or Debate purposes, *see Gravel*, 408 U.S. at 616-17, and are therefore already privileged to decline to reveal legislative material if instructed to do so by the Member. With respect to electronic surveillance, minimization procedures are already required, 18 U.S.C. § 2518(5), and DOJ

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[14] DOJ's assertion that it will no longer carry out searches in a Member's home office in the District of Columbia, Petition at 24, or use wiretaps or pen registers against Members in the District of Columbia, Petition at 25, is a unilateral decision by DOJ that is not mandated by the court of appeals' holding.

[15] The petition notes that while the court of appeals' decision should not apply to voluntary interviews because it addresses only compelled disclosures, "the decision may presage a more expansive application." Petition, at 25. This claim demonstrates the speculative nature of DOJ's concerns.

recognizes that the minimization requirement applies to intercepting privileged communications.[16]

In any event, it has long been recognized that the functions performed by the Speech or Debate Clause in our constitutional framework – preserving legislative independence and the separation of powers – are so important that the privileges provided by the Clause must be protected even if they conflict with the interests of law enforcement. Thus, courts have held that the Speech or Debate privilege may require the dismissal of an indictment, *see United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980), or the reversal of a conviction. *See United States v. Johnson*, 383 U.S. at 184-85. If these results must be accepted to carry out the purposes of the Clause, then procedures that make evidence-gathering slower or more cumbersome are certainly tolerable.

Because the court below correctly resolved the narrow Speech or Debate issue that was before it, there is no reason to grant certiorari in this case.

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[16] When preparing an affidavit for a Title III application, DOJ attorneys are cautioned that the affidavit "must contain ... standard minimization language *and other language addressing any specific minimization problems (e.g., steps to be taken to avoid the interception of privileged communications* ...)." U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 29(G) (emphasis added), available at http://www.usdoj.gov/usao/eousa/foiareadingroom/usam/title9/crm00029.htm.

## III. The Asserted Conflict With The Third Circuit's *Eilberg* Decision Does Not Warrant Review.

DOJ asserts that a conflict between the decision of the D.C. Circuit and the decision of the Third Circuit in *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) ("*Eilberg*"), supports its request for a writ of certiorari. As the petition acknowledges, however, there is no direct conflict between the court of appeals' decision and *Eilberg*, because *Eilberg* did not involve the execution of a search warrant on a Congressional office. Instead, *Eilberg* involved a subpoena served on the Clerk of the House for telephone records. The Third Circuit found that the testimonial aspect of the Speech or Debate Clause was not implicated because neither the Congressman nor his aides had been subpoenaed, and because the government had obtained many of the same records from the telephone company, a non-legislative source. 587 F.2d at 597.

It is true that *Eilberg* rejected the Speech or Debate non-disclosure privilege that was relied on by the court of appeals here. For the reasons set forth above, Rep. Jefferson submits that in that respect, *Eilberg* was wrongly decided.[17] But even if there appears to be a circuit conflict, it cannot overcome

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[17] It also appears that the Third Circuit has backed away from *Eilberg's* blanket rejection of a non-disclosure privilege. *See* Order in *United States v. McDade*, No. 96-1508 (3d Cir. July 12, 1996) (unpublished), at JA 262-63 (where district court had determined that documents were covered by the Speech or Debate privilege, court of appeals stated *Eilberg* "neither required nor authorized disclosure to the government").

the fact that the petition is aimed at the reasoning, not the judgment, of the court below, and further seeks an advisory opinion relating to parties and matters that are not before the Court. This is not a case where further review is appropriate.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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